IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

PLAINTIFF COMMON GROUND HEALTHCARE COOPERATIVE'S REPLY IN SUPPORT OF MOTION FOR RELIEF REGARDING CLAIMS RECONCILIATION PROCESS

Plaintiff Common Ground Healthcare Cooperative ("CGHC" or "Plaintiff") respectfully submits this Reply In Support of its Motion for Relief Regarding Claims Reconciliation Process. In that Motion, Plaintiff requests that the Court enter an Order requiring the Government to provide members of the CSR Class additional time to submit CSR data, if such additional time is requested by class members. The Government opposes Plaintiff's request for relief, arguing that the requested relief is outside the Court's jurisdiction and that "HHS cannot change the data submission window." In the alternative, the Court should reconsider entering judgment now in the amount of the monthly advance payments as originally requested by Plaintiff rather than potentially forcing some Class members to forego full recovery under the Court's judgment. This would allow the CSR Class (cumulatively the biggest stakeholders) to meaningfully participate in the appeal of the CSR payment issue. As discussed below, the Government's arguments are without merit.

I. This Court Has Jurisdiction To Order The Requested Relief

On February 15, 2019, this Court granted Plaintiff's motion for summary judgment, finding the cost-sharing reduction provision of the Affordable Care Act "is a money-mandating

statute for Tucker Act purposes," and HHS' "failure to make such payments is a violation of that duty that deprives the insurers of money to which they are statutorily entitled." *See* 2/15/2019 Order, Dkt. 48, at 15. Having found the Government liable pursuant to a money-mandating statute, the Court has jurisdiction under the Tucker Act to enter orders related to the determination of the amount of money damages that are owed. In this class action context, this is essentially the claims adjudication process, whereby the Government will validate class members' claims. However, according to the Government, the Court lacks jurisdiction to supervise this claims adjudication process and ensure that class members are provided a fair and adequate opportunity to submit their claims (and thereby collect damages for the amounts this Court has already determined that class members are owed pursuant to a money-mandating statute). Opp. Brief, at 4. The Government is wrong: this Court *does* have jurisdiction to oversee the process used to determine the amount of money damages that should be awarded.

The Government cites *Alvarado Hospitals LLC v. Price*, for the proposition that this Court lacks jurisdiction to order the requested relief. *See* Opp. Brief, at 4 (citing *Alvarado Hospitals LLC v. Price*, 868 F.3d 983, 999 (Fed Cir. 2017)). While that opinion stands for the basic proposition that the Tucker Act does not generally confer jurisdiction to order declaratory or injunctive relief, it says nothing about the Court's power to supervise the process for determining the amount of a monetary judgment.

Further, the Government misinterprets relevant case law when it states that because a final money judgment has not yet been issued, it cannot "be an anchor for any non-monetary relief." Opp. Brief, at 4. Rather, it is clear that the Court of Federal Claims *does* have jurisdiction pursuant to the Tucker Act to enter orders (including orders for equitable relief) where such relief is required in order to determine the amount of monetary damages to award.

Such orders are considered incident to an award for monetary damages and are properly within the Court's Tucker Act jurisdiction. For example, in *N. Colo. Water Conservancy Dist. v. United States*, the court granted in part the plaintiff's motion for summary judgment on a suit for damages brought under the Tucker Act, and then noted that "in such a suit the court may enter certain types of equitable relief 'as an incident of and collateral to' a money judgment." 88 Fed. Cl. 636, 665 (2009). Although the court denied the request for an injunction to "enjoin the United States Bureau of Reclamation from violating Article 22 in the future," the court stated that it *did* have jurisdiction to order an accounting as equitable relief "because that relief in a case such as this is a necessary precursor to an award of damages." *Id. See also Legal Aid Soc. Of New York v. United States*, 92 Fed. Cl. 285, 301 (2010) (Court of Federal Claims may use its incidental powers set forth in Section 1491(a)(2) of the Tucker Act "to 'aid in rendering [a] money judgment,' such as in cases where an audit or some other procedure is necessary to arrive at a money judgment.") (citations omitted).[1]

To be clear, the relief sought by Plaintiff is simply to allow Class members additional time to submit their CSR claims data for amounts owed as part of the damages award in this litigation. Plaintiff is not seeking to change HHS' claims reconciliation process going forward or to impact the schedule for non-litigants. Rather than have the claims administrator or the Court oversee the CSR claims administration process to determine the monetary amounts Class

[1] *See also Pauley Petroleum Inc. v. United States*, 591 F.2d 1308, 1315-16 (Ct. Cl. 1979) ("Equitable doctrines can be employed incidentally to this court's general monetary jurisdiction either as equitable procedures to arrive at a money judgment…or as substantive principles on which to base the award of a money judgment.") (citations omitted); *Klamath v. United States*, 174 Ct. Cl. 483, 491 (1966) ("If, after a trial on the issue of liability, it is held that defendant has violated its statutory fiduciary obligations, it will be within the jurisdiction of the court to order the defendant in its capacity as a trustee to render an accounting for the purpose of enabling the court to determine the amount which plaintiffs are entitled to recover.").

members are owed in this lawsuit (or have Plaintiff seek expensive and time-consuming discovery from the Government), the Government requested that the amounts owed be determined by HHS through a process similar to the claims reconciliation process HHS typically conducts. However, now that the Government got its wish to involve HHS in the claims adjudication process, it cannot now argue that the Court is without jurisdiction to ensure that Class members have an adequate opportunity to submit their claims.

II. Failing To Provide Adequate Time For Submission Of CSR Claims Prejudices The Class

As described in Plaintiff's Motion, QHP Issuers bear the burden and expense of preparing and submitting CSR claims to HHS for reconciliation. This often requires hiring third-party vendors or diverting internal resources. The expense can run into the tens of thousands of dollars or more. In prior years, QHP Issuers had advance notice that HHS would be engaging in a claims reconciliation process for the prior benefit year, and we understand that HHS provided ongoing communication with QHP Issuers in the months leading up to the claims reconciliation process. Here, QHP Issuers were not informed until March 2019 that HHS was, in fact, actually operating a claims reconciliation process in 2019. As a result, many Class members were left scrambling to re-establish their claims submission infrastructure (*e.g.,* re-engaging third-party vendors, compiling necessary data internally).

Moreover, the Government first announced the dates that the online submission window would be open on April 3, 2019—the night before the window opened on April 4, 2019.[2] Instead

[2] While the Government suggested in its March 5, 2019 Joint Status Report that it would offer an expedited claims reconciliation process, it was not clear that such a compressed schedule would be *mandatory*. In its opposition brief, the Government states that "[t]he class did not opine" on this March 5 proposal or "indicate in any way that the schedule was problematic." Opp. Brief, at 3. Plaintiff did not opine on the Government's proposed schedule in the March 5,

of the 60 days provided last year, the Government initially provided Class members with only 29 days to submit their claims. After receiving conflicting information from HHS and the Department of Justice regarding whether Class members would be granted extensions, it now appears that Class members will be granted extensions to May 31, 2019. Nevertheless, this still provides Class members only 57 days to submit CSR data, as compared to the 60 days provided last year. Due to the uncertainty surrounding this year's claims reconciliation process and the delay in receiving information about the process from the Government, QHP Issuers need *more* time to submit claims data this year, not *less*. Class members should be provided with enough time to ensure that the CSR claims data they are submitting is accurate and complete. Extending the claims submission deadline to June 7, 2019 (four days more than were provided last year) would ease this burden on Class members and account for the fact that detailed information about the process was provided to QHP Issuers later than in previous years.

In its opposition, the Government states that "HHS cannot change the data submission window," but does not offer any explanation as to why that is the case. The Government states that "CMS coordinated extensively with HHS and its contractors to be able to enable CMS to bifurcate the CSR data submission window and to provide updated guidance to all issuers, including producing FAQ (frequently asked questions) and webinar instructions on the 2018 reconciliation process." Opp. Brief, at 3. The Government also says that "having to reestablish different submission windows" will require "extensive coordination within HHS and with its

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2019 status report because (1) Plaintiff only received notice of the Government's proposal hours before the Joint Status Report was filed and did not have time to solicit feedback from all QHP Issuers; and (2) Plaintiff was offering a competing proposal in the March 5 filing, and the failure to comment on the specifics of the Government's proposed schedule was not an endorsement of it. Once Class counsel began hearing from members of the CSR Class that many of them would need additional time to complete their submission of CSR claims data, Class counsel promptly raised this issue with the Government.

contractors to accept and process data and to provide updated guidance to issuers." *Id.* at 5. While this describes the work HHS and CMS had to do to prepare for the CSR claims reconciliation process (for litigants and non-litigants alike), it offers no explanation as to why it is impossible (or burdensome in any way) to provide Class members with one additional week to ensure that they have enough time to submit their claims data. Indeed, in prior years, HHS has in some cases granted individual extensions to QHP Issuers to submit data weeks or months after the close of the online submission window.

III. Plaintiff Sought Early Judgment, But Did Not Seek To Compress Claims Reconciliation Schedule

Contrary to the Government's arguments, Plaintiff is not "reversing course." In the March 5, 2019 Joint Status Report, Plaintiff suggested a process that would result in a speedy judgment by requesting that the Court enter judgment based on the advance monthly payments HHS would have made to QHP Issuers (which were already calculated), and then conducting the claims adjudication process after entry of judgment. *See* 3/5/2019 Joint Status Report, Dkt. 53, at 2-4. The Court rejected Plaintiff's suggestion and determined that the process should proceed in the manner suggested by the Government—conducting the claims reconciliation process prior to entry of a final judgment. *See* 3/7/2019 Order, Dkt. 54.

Plaintiff's desire for a speedy judgment was straight forward: getting a speedy judgment would shorten the time for the Government to perfect its appeal and allow Plaintiff to meaningfully participate in the appeal of the CSR payment issue (as other cases are already pending before the Federal Circuit). Plaintiff never asked for a compressed reconciliation schedule. Nor did its request for a speedy judgment equate to a request for a compressed claims reconciliation schedule. These are two separate issues.

If reconciliation must, as the Court has already ruled, occur before judgment, it is critical that that process be proper and that Class members have the requisite time to submit complete and accurate CSR claims data. Class members should not be forced to forego recovery in order to meet HHS' deadline. Once the Government announced that the submission window would be open for only 29 days, Class counsel was contacted by numerous Class members who stated that this time frame was insufficient to complete their CSR claims data submissions. Class counsel promptly contacted the Government regarding its concerns, and after a meet and confer failed to resolve this issue, Plaintiff filed its Motion for relief.

Conclusion

Therefore, for the foregoing reasons and those discussed in Plaintiff's Motion, Plaintiff respectfully requests that the Court enter an order requiring the Government to grant an extension through June 7, 2019 to any member of the CSR Class who requests one. This would effectively provide members of the CSR Class 64 days to complete the data submission process (four days more than were provided last year) to account for the fact that detailed information about the process was provided to QHP Issuers later than in previous years and to allow Class members to make a complete and accurate submission of their CSR claims data.

In the alternative, if this Court determines that it does not have jurisdiction to order the Government to provide Class members with an extra week to submit their claims data (although to be clear, the Court *does* have such jurisdiction), Plaintiff renews its request to have a final judgment for the 2018 CSR amounts entered based on the monthly advance payments that HHS has already calculated (and which HHS would have paid out to QHP Issuers each month, had it complied with its statutory obligations pursuant to the money-mandating statute). It is unjust to have the Government (the opposing party in this litigation) control the claims adjudication

process and deny Class members the time they need to submit claims for the full amounts they are owed.

Dated: April 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 19, 2019, a copy of the foregoing Plaintiff's Reply in Support of Motion for Relief Regarding Claims Reconciliation Process was served via the Court's CM/ECF system on Defendant's counsel.

/s/ Stephen Swedlow
Stephen Swedlow